United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1328

To be argued by
DANIEL H. MURPHY, II

DOCKET NO. 75-1328

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 75-1328

UNITED STATES OF AMERICA,

Appellee,

-v.-

AUSTIN P. WILLIS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT AUSTIN P. WILLIS

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UNITED STATES OF AMERICA,

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BRIEF OF DEFENDANT-APPELLANT UNITED STATES OF AMERICA

Issue Presented

Whether the withholding allowance certificate and instructions thereunder gave defendant fair notice that if he misread line 4 of such forms to deal in $750 units of income rather than $750 units of itemized deductions, he performed such misreading subject to the perils of the Federal criminal law.

STATEMENT OF THE CASE

Preliminary Statement

Austin P. Willis appeals from a judgment of conviction entered on August 1, 1975, in the United States District Court for the Northern District of New York following a two-day trial before the Honorable Lloyd F. MacMahon, United States District Judge for the Southern District of New York sitting by designation, and a jury.

Information 74 Cr. 108, filed on August 1, 1974, charged Willis in three counts with violations of the Federal Income Tax laws.° Count One charged Willis with filing a false and fraudulent withholding certificate with his employer on or about March 19, 1972. The certificate was alleged to be false in that it claimed 10 allowances although only 8 were due. Count Two charged Willis with filing a false and fraudulent withholding certificate with his employer on or about June 19, 1972. The second certificate claimed 15 allowances although the Government charged only 8 were due. Count Three charged Willis with filing a false and fraudulent withholding certificate with his employer on or about May 18, 1973. The third certificate claimed 21 allowances although the Government charged only 8 were due (App. 3-4).*

The jury was selected and sworn and the trial testimony was

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* Parenthetical references are to the Appellant's Appendix.

° 26 U.S.C. §7205.

received on June 26, 1975. Willis took the stand on his own behalf. Both sides gave their summations and the Court charged on June 27, 1975. The jury found Willis not guilty on Counts One and Two and guilty as charged on Count Three (App. 142). On August 1, 1975, Judge MacMahon sentenced Willis to one year on Count Three; execution of sentence was suspended; and Willis was placed on probation for one year (App. 146). Willis is currently serving his probation.

Statement of the Facts

Willis was 61 at the time of the offense for which he was convicted (App. 57). He was married and had 10 children (App. 57-58). Five of his children were living at home at the time of his offense (App. 55-56). Revenue Agent Tholfsen, when called by the Government, calculated the exemptions allowed Willis as one for himself, one for his wife, 5 for his children, plus a special exemption for a non-working wife, for a total of 8 (App. 62-63). Ronald P. Turcot, when called by the Government, identified himself as the Supervisor of Financial Accounting for Willis' employer. Turcot supervised the payroll section and took care of the General Ledger and Financial Statement of General Laboratory Associates, the employer. Turcot testified that he did not assist Willis in determining the correct number of his allowances (App. 43-44, 51-52). Turcot explained that a computer did all the calculations for those employees who claimed more than 10 exemptions. (App. 49).

The Government introduced the three withholding certificates in issue (App. 5-12). The legends at the bottom of the two certificates on which Willis was acquitted read as follows:

> "Under the penalties of perjury, I certify that the number of withholding exemptions and allowances claimed on this certificate does not exceed the number to which I am entitled." (App. 5,7).

However, the perjury warning was deleted from the legend at the bottom of the certificate on which Willis was convicted. That certificate reads as follows:

> "I certify that to the best of my knowledge and belief, the number of withholding allowances claimed on this certificate does not exceed the number to which I am entitled." (App. 11).*

Willis took the stand in his own defense and testified that he interpreted the instructions on the form on which he was convicted to mean that "for every $750 that you expect to make, that gives you an extra exemption." (App. 79). The defense counsel inquired as to the basis for the defendant's understanding. Willis gave the following testimony:

> "Q. May I show you Government's Exhibit 5, and there is an employee worksheet here. Where in the world did you get that idea for that?
>
> "A. Well, let me see, that is - right here (indicating).

---

* On the back of the form, the following legend appears:
"If You Need More Detailed Information, See the Instructions that Came with Your Last Federal Income Tax Return or Call Your Local Internal Revenue Office." (App. 12).

"Q. Why don't you read it to the jury?

"A. All right. If the amount on line 4 is over $6,750, you get 9 allowances plus 1 allowance for each $750 or fraction thereof by which the amount on line 4 exceeds the $6,750.

"Q. So if was your understanding, then, that for every $750 additional income -

"A. That is right.

"Q. - that you could claim an additional exemption?

"A. Yes." (App. 86).

Willis filled out the certificates and worksheets himself (App. 87, 43-44, 96). He did not read the Internal Revenue Code but merely took "the W-4 form at face value." (App. 87, 96).

The defense moved for judgment at the close of the case, and the following colloquy occurred between the Court and Government counsel:

"THE COURT: But what did that form say? Did I hear it correctly when it was read, that for every $750 worth of income you can take an additional allowance, and is that what the form says?"

"MR. WELCH [Government counsel]: Not exactly.

"THE COURT: May I see it?

"MR. WELCH: Close to that, your Honor. It has to be a determinable allowance, and it is $750 in excess of your standard deductions." (App. 99).

The Court reserved decision and termed the instructions on the Government tax forms "gobbledy-gook." (App. 99).

After the jury verdict, the defense renewed its motion for judgment on the ground that "the form itself is extremely misleading." (App. 143). The Court denied the motion and rendered the following oral decision:

> THE COURT: "The Court has grave misgivings about whether these forms and the regulations behind them lend themselves to enforcement through the criminal processes.
>
> "Nonetheless, the District Court must exercise great restraint before declaring the statutes and regulations implementing them void for vagueness or indefiniteness. This jury was given these forms during the trial and while ordinarily I would not delay for each member of the jury to read forms of this type, all of the exhibits were carefully read by every juror,and we all sat here silently while the jury did it.
>
> "There was a motive in my doing that, rather than letting Counsel sum up on them, and arguing what you think the forms showed or did not show, and that was to let the jury have a good opportunity to see whether they were confused by this. Apparently, they were not, as to Count 3.
>
> "The issue was clearly put to the jury, on a Charge, which both sides found unexceptionable.
>
> "On both summations, I think that it was made perfectly clear to the jury what the issue was. The Court made clear at the very outset, and during the Charge, that the issue was whether the defendant made an honest mistake, or whether he deliberately made false statements on his returns.
>
> "The jury found against him, and I think in light of all of the evidence that that finding was certainly one which a jury could reach. Reasonable men might reach different conclusions about it, but there was sufficient evidence for the jury to find the defendant guilty beyond a reasonable doubt on Count 3.
>
> "Accordingly, I deny the motion, and set August 1 for sentencing." (App. 144-145).

It is the defense position on this appeal that determination of whether the W-4 regulations relied upon by Willis are uncon-

stitutionally vague is one of law for the Court and that the Court below erred when it put that issue to the jury as one of fact, "[to let the jury] see whether they were confused by this." [App. 144].

ARGUMENT

THE WITHHOLDING ALLOWANCE CERTIFICATE, INSTRUCTIONS, AND WORK SHEET UNDER WHICH DEFENDANT WILLIS WAS CONVICTED ARE IMPERMISSIBLY VAGUE IN THE CONSTITUTIONAL DUE PROCESS SENSE

When Willis submitted Government Exhibit 3 to his employer, he was 61 years old and married with 10 children of whom 5 still lived at home. His wife was not working, and Willis had supplemented his income by working at various odd jobs (App. 85-86). He was entitled to 8 allowances, independent of any allowances claimed for itemized deductions (App. 62-63). He estimated his total annual salary or wages from all sources for 1973 at $14,900 (App. 10). The worksheet for Form W-4 was printed by the U.S. Government Printing Office (ibid.), and the worksheet noted:

> "If the amount on line 4 is over $6,750 you get 9 allowances, plus 1 allowance for each $750 or fraction thereof by which the amount on line 4 exceeds $6,750." (App. 10).

On its face that instruction is unclear since "if the amount on line 4 is over $6,750", the taxpayer must receive at least 10

allowances not "9 allowances" as the form states. The second portion of the instruction following the comma and beginning with the word "plus" does attempt to correct the lack of clarity in the first portion. The misapprehension made by Willis is that he took the amount on line 4 and the note quoted to refer to income while the Government contends that it refers to deductions not income. Neither line 4 nor line 3 on the form mentions either the word deductions * or the word income. However, lines 2, 3 and 4 appear in the deductions column while line 1 appears in the income column. The issue is whether the work sheet is sufficiently clear that a taxpayer with 8 non-deduction allowances who construes the $750 unit to refer to income not itemized deductions makes that construction at the peril of the sanctions of the criminal law.

The complexity of the tax laws is a matter of common knowledge. The leading case on the criminal tax laws recognized the problem:

> "***It is the right as well as the interest of the taxpayer to limit his admission of liability to the amount he actually owes. But the law is complicated, accounting treatment of various items raises problems of great complexity and innocent errors are numerous, as appears from the number who make overpayments. [footnote omitted]. It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay. [statute omitted]."
> Spies v. United States, 317 U.S. 492, 496 (1943).

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* Save in the parenthetical remark in line 4 which is a statement as to the ultimate conclusion of the formula.

The problem is exacerbated when the class of persons to whom the instructions are directed is considered. Grayned v. City of Rockford, 408 U.S. 104, 112 (1972). That class is employee-wage earners in the main, for professionals such as doctors or lawyers tend to work as independent contractors not as employees. In construing a statute the Court may consider "the poor among us, the minorities, the average householder [who] are not in business and not alerted to [various] regulatory schemes." Papachristou v. City of Jacksonville, 405 U.S. 156, 162-163 (1972). The New York Times has noted "a [United States] Government report that 23 million adults in the United States were functionally illiterate and that 34.7 million could not calculate the comparative costs of goods in different packages." The New York Times, January 19, 1976, p. 10:6. This Court may take judicial notice of the commonly perceived state of the society in which the law was intended to operate. Smith v. Goguen, 415 U.S. 566, 573-4, 580 (1974).

Against that backdrop, we apply the rule as to unconstitutional vagueness. That rule is in two parts:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement consonant alike with ordinary rules of fair play and the settled rules of law. And

> a statute which either forbids or requires the doing of an act in terms so vague that men or ordinary intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. [citations omitted]." Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

The W-4 instructions are neither sufficiently explicit for the reasons states above nor does the certificate itself give fair warning. Government Exhibits 4 and 2 (App. 5,7) contain perjury warnings while Government Exhibit 3 (App. 11), the certificate on which Willis was convicted, does not contain a perjury warning.* Failure to provide a perjury warning coupled with the complexity of the instructions renders the W-4 certificate when used as a basis for a criminal prosecution little more than a trap. The wage-earning taxpayer with 9 allowances wanders into a situation where he is "required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzatta v. New Jersey, 306 U.S. 451, 453 (1939). A statute which compels such speculation is violative of due process. United States v. Jones, 365 F.2d 675, 678 n.5 (2d Cir. 1966). A statute

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* That deletion may reflect the administrative determination grounded on 26 U.S.C. §6682 to limit prosecutions for false certificater to the civil penalty in the light of the complexity of the rule. Such an administrative determination would also mirror the discomfort of Judge MacMahon below who questioned "whether these forms and the regulations behind them lend themselves to enforcement through the criminal processes." (App. 144). See 26 U.S.C. § 7205.

which either forbids or requires the doing of an act in terms so vague that men of ordinary intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. Connally v. General Construction Co., supra, 269 U.S. at 391.

As the leading commentator put the desideratum, the upholding of a criminal statute or its overthrow in a particular case depends upon the reviewing court's "felt want of fair notice". Note: The Void for Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67, 76 (1960) (Amsterdam). Here, there was a felt want of fair notice to Willis.

It does not resolve the problem that Judge MacMahon put the issue of confusion vel non to the jury, for it is the vice of a vague law that it "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [footnote omitted]." Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

CONCLUSION

The judgment below should be reversed on the ground that defendant was convicted for filing a false exemption certificate where it and the instructions drawn thereunder were unconstitutionally vague.

Dated: New York, New York
January 19, 1976

Respectfully submitted,

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ADDENDUM

Text of Relevant Statutes

Internal Revenue Code of 1954 (26 U.S.C.).

§ 3402. Income tax collected at source

* * * *

(f) Withholding exemptions. -

* * * *

(2) Exemption certificates. -

* * * *

(B) Change of status. -

* * * * If, on any day during the calendar year, the number of withholding exemptions to which the employee is entitled is greater than the number of withholding exemptions claimed, the employee may furnish the employer with a new withholding exemption certificate relating to the number of withholding exemptions which the employee then claims, which shall in no event exceed the number to which he is entitled on such day.

§ 7205. Fraudulent withholding exemption certificate or failure to supply information.

Any individual required to supply information to his employer under section 3402 who wilfully supplies false or fraudulent information, or who wilfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both.

§ 6682. False information with respect to withholding allowances based on itemized deductions.

(a) Civil penalty. - In addition to any criminal penalty provided by law, if any individual in claiming a withholding allow-

ance under section 3402 (f)(1)(F) [refers to allowances under § 3402(m) which covers withholding allowances based on itemized deductions] states (1) as the amount of the wages (within the meaning of chapter 24) shown on his return for any taxable year an amount less than such wages actually shows, or (2) as the amount of the itemized deductions referred to in section 3402(m) shown on the return for any taxable year an amount greater than such deductions actually shown, he shall pay a penalty of $50 for such statement, unless (1) such statement did not result in a decrease in the amounts deducted and withheld under chapter 24, or (2) the taxes imposed with respect to the individual under subtitle A for the succeeding taxable year do not exceed the sum of (A) the credits against such taxes allowed by part IV of subchapter A of chapter 1, and(B)the payments of estimated taxes which are considered payments on account of such taxes.

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

Daniel H. Murphy, II, being duly sworn, deposes and says: deponent is not a party to the action, is over 13 years of age and resides at 420 Monterey Avenue, Pelham Manor, New York 10803

Check Applicable Box

☒ Affidavit of Service By Mail

On January 19, 1976 deponent served the within Brief of Defendant-Appellant upon Hon. James M. Sullivan, Jr., USAtty, NDNY, attorney(s) for Appellee in this action, at Federal Building, Syracuse, New York 13201 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service

On 19 at

deponent served the within upon

herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on January 20, 1976

Patricia Dennigan

PATRICIA DENNIGAN
Notary Public, State of New York
No. 24-4618654
Qualified in Kings County
Commission Expires March 30, 1977

The name signed must be printed beneath

Daniel H. Murphy, II